IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	**CRIMINAL ACTION**
Plaintiff,	:	
v.	:	
IFEDOO NOBLE ENIGWE,	:	**NO. 92-257**
Defendant.	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 14th day of January, 2003, upon consideration of defendant's Motion for Bail Pending Appeal (Document No. 349, filed August 30, 2002), Government's Response to Defendant's Motion for Bail (Document No. 355, filed October 4, 2002), and Defendant's Reply to Government's Response to Pending Bail Motion (Document No. 356, filed October 15, 2002), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that defendant's Motion for Bail Pending Appeal is **DENIED**.

IT IS FURTHER ORDERED that defendant's Motion for Appointment of Counsel and to Expedite Ruling on Pending Motion (Document No. 358, filed December 11, 2002) is **DENIED AS MOOT**.

MEMORANDUM

I. BACKGROUND

The Court sets forth only an abbreviated factual and procedural history as pertinent to the

pending motion. A detailed factual and procedural history is included in the Court's previously reported opinions in this case. E.g., United States v. Enigwe, Cr. No. 92-257, 2001 WL 708903, at *1-2 (E.D. Pa. June 21, 2001) (postconviction procedural history); United States v. Enigwe, 212 F. Supp. 2d 420 (E.D. Pa. 2002) (same); United States v. Enigwe, Cr. No. 92-257, 1992 WL 382325, at *2-3 (E.D. Pa. Dec. 9, 1992) (factual history).

On May 6, 1992, defendant Ifedoo Noble Enigwe was indicted on four counts by a Grand Jury in the Eastern District of Pennsylvania for trafficking in heroin. He was convicted by a jury on all four counts on August 12, 1992 and, on August 13, 1993, was sentenced by this Court to 235 months in prison and five years of supervised release. Defendant's conviction and sentence were affirmed on appeal by the Third Circuit in an unpublished decision on April 28, 1994. United States v. Enigwe, 26 F.3d 124 (3d Cir.) (table), cert. denied, 513 U.S. 950 (1994). Defendant is currently serving his sentence at MDC-Brooklyn, Brooklyn, New York.

Defendant's first habeas petition, which was filed on August 24, 1994, was finally denied (after a remand from the Third Circuit) on July 16, 1997. United States v. Enigwe, Cr. No. 92-257, 1997 WL 430993 (E.D. Pa. July 16, 1997), aff'd, 141 F.3d 1155 (3d Cir.), cert. denied, 523 U.S. 1102 (1998).

After that denial, defendant filed a number of motions including four separate successive habeas petitions.[1] United States v. Enigwe, Cr. No. 92-257, 1998 WL 670051, at *2 (E.D. Pa. Sept. 28, 1998) (discussing defendant's multiple filings). The Court denied these petitions on

[1] Although under the relevant statutory language, see 28 U.S.C. § 2244(b), each habeas petition is properly characterized as "second or successive," for the sake of clarity, the Court refers to defendant's various "second or successive" petitions as defendant's second, third, fourth, and fifth petitions.

procedural grounds. Id. at *3-4. The Third Circuit affirmed the Court's decision in an unpublished opinion. United States v. Enigwe, No. 98-1838 (slip op.) (3d Cir. Nov. 20, 2000), cert. denied, 531 U.S. 1185 (2001).

Defendant filed a fifth habeas petition on November 16, 2000. In that petition, defendant raised the following arguments predicated on the U.S. Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000):[2] (1) drug quantity is an essential element of the offenses charged and, because the Court failed to submit that issue to the jury, the Court lacked jurisdiction and the indictment must be dismissed and the sentence vacated, (2) the conviction must be reversed because the government failed to prove drug quantity, an essential element of the offenses charged, (3) because the government failed to prove an essential element of the offenses charged, drug quantity, the evidence presented at trial was insufficient to support the conviction and defendant cannot be retried, and (4) even if the conviction stands, defendant is entitled to be resentenced because the Court imposed sentencing enhancements that were not charged or submitted to the jury, and the Court did not find the government had established the enhancements beyond a reasonable doubt. Enigwe, 2001 WL 708903, at *3.

By Order and Memorandum dated June 21, 2001, the Court denied defendant's fifth habeas petition. The Court concluded that since defendant was sentenced to 235 months, five months less than the twenty year (240 month) maximum allowable sentence under 21 U.S.C. § 841(b)(1)(C), the rule articulated in Apprendi did not apply. Id. at *4 (quoting United States v.

[2] Apprendi provides that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

Cepero, 224 F.3d 256, 268 n.5 (3d Cir. 2000)). In light of that ruling, the Court did not address the issue of Apprendi's retroactivity in the June 21, 2001 Memorandum.[3] Id.

Defendant filed a timely appeal of the June 21, 2001 Order. The Third Circuit stayed the appeal pending a determination by this Court as to whether a certificate of appealability ("COA") ought to issue.[4] By Order dated August 21, 2001, this Court concluded that a COA was not required on the ground that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was inapplicable. The Third Circuit disagreed and, by Order dated April 23, 2002, held that because defendant's fifth habeas petition was filed after AEDPA's effective date, defendant was required to obtain a COA and one would not issue because he had not made a substantial showing of the denial of a constitutional right. See United States v. Enigwe, No. 01-2760 (3d Cir. Apr. 23, 2002) (slip op.).

In 1999 and 2000, while defendant's third and fourth habeas petitions were pending at various stages of litigation, defendant filed a number of motions raising claims with respect to his conviction, sentence, and the Court's denials of his earlier motions. By Order dated May 31,

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[3] In Teague v. Lane, 489 U.S. 288 (1989), a plurality of the Supreme Court adopted a new approach to the retroactive application of newly announced legal rules in habeas corpus proceedings. Central to the Teague doctrine is the distinction between an "old rule," to which retroactivity concerns do not apply, and a "new rule," which, with two exceptions, may not be enforced by a habeas petitioner if it was announced after his conviction became final. Id. at 305-07. A new rule is inapplicable on collateral review unless (1) the new rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or (2) the rule requires "the observance of those procedures that . . . are implicit in the concept of ordered liberty." Id. at 307 (citations and internal quotation marks omitted).

[4] As discussed more fully in § II.C, infra, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that the right to appeal a district court's denial of habeas relief is governed by 28 U.S.C. § 2253(c), which requires the petitioner to obtain a certificate of appealability ("COA") in order to prosecute an appeal.

2001, the Court granted Defendant's Motion to Dismiss [Designated Motions Filed By Defendant] Without Prejudice (Document No. 297, filed January 16, 2001), and dismissed all such motions without prejudice. After this Court's dismissal of defendant's fifth habeas petition on June 21, 2001, see Enigwe, 2001 WL 708903, defendant filed a Motion to Reinstate [Defendant's] Motions Which Were Dismissed Without Prejudice (Document No. 313, filed August 10, 2001). Defendant also filed three additional motions. Id.

By Memorandum and Order dated July 30, 2002, the Court denied all of defendant's pending motions. United States v. Enigwe, 212 F. Supp. 2d 420 (E.D. Pa. 2002). Of relevance to the motion currently before the Court is the Court's denial of defendant's motion under Federal Rule of Civil Procedure 60(b) for reconsideration of the Court's June 21, 2001, dismissal of his fifth habeas petition. The Court permitted defendant to use Rule 60(b) to seek reconsideration of the Court's June 21, 2001 dismissal of his Apprendi claim, id. at 429-30, but denied relief on the ground that Apprendi was not a retroactive rule. Id. at 430-31.

In the Memorandum and Order dated July 30, 2002, the Court also rejected defendant's Apprendi claim on the merits, stating that even if defendant was correct in his argument that the Court erred in not submitting the issue of drug identity to the jury under Apprendi, any such error did not warrant relief. Id. at 431-34. That determination by this Court was based on the Third Circuit's decisions in United States v. Barbosa, 271 F.3d 438 (3d Cir. 2001) and United States v. Vazquez, 271 F.3d 93 (3d Cir. 2001), holding that Apprendi errors not raised at trial are subject to plain-error review. Under that standard, detailed in the Memorandum and Order of July 30, 2002, this Court ruled that defendant did not, and could not, show that the alleged Apprendi error impacted his substantial rights. That ruling was based on the following:

- Apprendi is implicated only if a sentence exceeds the statutory maximum sentence for a crime;
- the jury convicted defendant of importing a controlled substance;
- the only evidence at trial concerning a controlled substance related to heroin distribution;
- the statutory maximum penalty for heroin distribution was (and still is) 240 months; and,
- defendant was sentenced, inter alia, to a period of incarceration of 235 months.

Notwithstanding this Court's conclusion that defendant had not established that any Apprendi error impacted his substantial rights, the Court issued a COA with respect to defendant's claims that his trial and/or sentence violate Apprendi so as to give the Third Circuit an opportunity to rule on those issues in the context of a Rule 60(b) Motion. On August 26, 2002, defendant filed a timely notice of appeal.

Presently before this Court are defendant's Motion for Bail Pending Appeal (Document No. 349, filed August 30, 2002) and defendant's Motion for Appointment of Counsel and to Expedite Ruling on Pending Motion (Document No. 358, filed December 11, 2002). For the following reasons, defendant's motions are denied.

II. DISCUSSION

A. STANDARD FOR BAIL PENDING APPEAL OF THE COURT'S DENIAL OF DEFENDANT'S POSTCONVICTION RELIEF

Defendant's conviction was affirmed by the Court of Appeals on direct appeal. Postconviction relief has already been denied by this Court on several occasions. Enigwe, 212 F. Supp. 2d at 431-34. Defendant now seeks bail pending appeal of this Court's ruling of July

30, 2002, denying reconsideration under Federal Rule 60(b) of an adverse decision on his fifth habeas petition.

"The eligibility of a habeas petitioner for bail is not on the same footing as that of a pretrial accused who is presumptively innocent, or that of a convicted defendant on direct appeal . . ." Ostrer v. United States, 584 F.2d 594, 599 (2d Cir. 1978); see also United States v. Enigwe, Cr. No. 92-257, 1994 WL 689055, at *2 (E.D. Pa. Dec. 6, 1994) ("A defendant whose conviction has been affirmed on appeal is unlikely to have been convicted unjustly.").

"[W]hen bail is sought by a prisoner who has been convicted in either state or federal court and the district court has denied the collateral relief sought, . . . '[i]t is obvious that a greater showing of special reasons for admission to bail pending review should be required . . . than . . . in a case where [the] applicant sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt.'" Landano v. Rafferty, 970 F.2d 1230, 1238 (3d Cir.) (quoting Aronson v. May, 85. S. Ct. 3, 5 (1964) (Douglas, J.) (chambers opinion)), cert. denied, 506 U.S. 955 (1992). The relief defendant seeks at this stage of the proceedings may be granted only if defendant has raised substantial constitutional claims upon which he has a high probability of success, and when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective. See id. at 1239; see also United States v. Mett, 41 F.3d 1281, 1282 (9th Cir. 1995) (reserving bail in habeas context for "'extraordinary cases involving special circumstances or a high probability of success.'" (citing Land v. Deeds, 878 F.2d 318, 318 (9th Cir. 1989)); Cherek v. United States, 767 F.2d 335, 337 (7th Cir. 1985); Ostrer, 584 F.2d at 599; Pfaff v. Wells, 648 F.2d 689, 693 (10th Cir. 1981); Williams v. United States, No. 99-CV-5805 (ILG), 2001 WL 984911 (E.D.N.Y. July 11, 2001).

"Very few cases have presented extraordinary circumstances." Landano, 970 F.2d at 1239. Those cases in which courts have found extraordinary circumstances have, for the most part, been limited to situations involving the impending completion of a prisoner's sentence or poor health. See, e.g., Boyer v. City of Orlando, 402 F.2d 966, 968 (5th Cir. 1968) (granting bail to defendant while he exhausted constitutional claim in state courts because sentence was so short—120 days—that if bail were denied and habeas petition were eventually granted, defendant would have already served sentence); Johnston v. Marsh, 227 F.2d 528, 528, 531 (3d Cir. 1955) (holding that district court considering § 2254 petition had inherent power to grant bail to prisoner pending decision on petition where prisoner was "an advanced diabetic [who] was, under conditions of confinement, rapidly progressing toward total blindness").

Citing this Court's opinion in United States v. Antico, 123 F. Supp. 2d 285 (E.D. Pa. 2000), defendant argues that the decision to release a person sentenced to a term of imprisonment pending appeal is governed by 18 U.S.C. § 3143. Under that statute, the defendant must satisfy two requirements in order to be released pending appeal: (1) the defendant must satisfy the Court, by clear and convincing evidence, that he is unlikely to flee or pose a danger to the safety of any other person or the community if released; and, (2) the defendant must establish that his appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a reduced sentence less than the total of the time served. 18 U.S.C. § 3143(b). With respect to the issues raised on appeal, defendant argues, again based on Antico, that a defendant seeking bail pending appeal must set forth "[a] substantial question . . . that is 'fairly debatable' on which reasonable jurists might disagree." Antico, 123 F. Supp. 2d at 287.

According to defendant, the Court has already determined that he has met this standard by issuing a COA.

Defendant's reliance on Antico is misplaced. Antico involved an application for bail pending the defendant's direct appeal of his conviction. Id. at 286. "The Bail Reform Act, 18 U.S.C. § 3141 et seq., by its terms applies only to motions for release pending sentence and appeal and does not apply to a convicted defendant who seeks post-conviction relief pursuant to 28 U.S.C. § 2255." Enigwe, 1994 WL 689055, at *2 (citing Cherek, 767 F.2d at 337); see also United States v. Mett, 41 F.3d 1281, 1282 (9th Cir. 1994); Ballou v. Massachusetts, 382 F.2d 292 (1st Cir. 1967). Therefore, Antico and the Bail Reform Act are not the proper standard to determine defendant's eligibility for bail.

To summarize, in order to obtain release on bail in this case, defendant must establish (1) that his appeal raises substantial constitutional claims upon which he has a high probability of success, and (2) that the grant of bail is necessary to make the habeas remedy effective because of the existence of extraordinary or exceptional circumstances. See Landano, 970 F.2d at 1238. Defendant does not argue that exceptional circumstances are present because he has misconstrued the standard upon which bail may be granted pending appeal of an adverse ruling on a habeas-related motion. Nevertheless, the Court will address each of defendant's arguments to determine whether there are exceptional circumstances presented which warrant bail pending appeal.

B. NO RISK OF FLIGHT

First, defendant contends that he does not pose a risk of flight because he believes he will prevail in his appeal and flight would defeat his efforts to overturn his conviction. He states that,

if the Court were to appoint counsel to represent him and hold a hearing on this issue, he could produce a number of witnesses who would truthfully testify to these facts.

This is not the first time that defendant has petitioned the Court for bail in connection with habeas proceedings. The Court previously denied defendant bail pending a decision of his habeas petition under 28 U.S.C. § 2255. Enigwe, 1994 WL 689055, at *1. By Memorandum and Order dated December 6, 1994, the Court found that defendant failed to show by clear and convincing evidence that he was not a flight risk. Id. at *3.[5] As the Court stated at that time, even though defendant's wife and child resided in Philadelphia, "[h]e presented no evidence that he resided or spent time with his family before he was arrested . . . ." Id. The Court also noted that defendant had traveled extensively to Nigeria, the place of his birth, and to Europe since his arrival in the United States, and that a large portion of his immediate family continued to reside in Nigeria. Id. Based on this evidence, the Court concluded that defendant had failed to prove by clear and convincing evidence that he was not a flight risk.[6] Id. (citing United States v. Deitz, 629 F. Supp. 655, 656 (N.D.N.Y. 1986) (concluding that evidence of defendants' family ties was insufficient to establish that defendants did not present flight risk and should be released prior to sentencing where defendants faced maximum sentences of thirty-five and fifty-five years imprisonment)).

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[5] The Court, in denying bail at that time, relied upon evidence presented by defendant at a hearing held on December 13, 1993, with respect to defendant's motion for bail pending direct appeal of his conviction. Enigwe, 1994 WL 689055, at *1. Following that hearing, the Court concluded, by Order dated January 25, 1994, that defendant had failed to prove by clear and convincing evidence that he was not a flight risk. Id.

[6] The Court made no determination as to whether defendant posed a danger to the community. Id. at *3 n.4.

Defendant makes two arguments why he is not a flight risk. First, he asserts that he genuinely believes he will prevail in his appeal. Second, he alleges that Congress recently introduced a bill which would return parole to the federal system. Neither argument, even if accepted as true by the Court, would change the Court's prior conclusion that defendant is not a flight risk. Defendant's "belief in a high probability of success is the belief harbored by every appellant, without more." Williams, 2001 WL 984911, at *1; see also Barnett v. Hargett, 166 F.3d 1220 (table) (10th Cir. 1999) (denying bail pending appeal of conditional grant of habeas corpus where prisoner did not allege any special or extraordinary circumstances beyond his belief that he would prevail on appeal). Nor can this Court grant bail based on the possibility that Congress may, in the future, reinstitute a federal system of parole.

Assuming, arguendo, that defendant could establish that he is a minimal flight risk, that, without more, would not justify bail pending appeal of an adverse habeas ruling. Even a minimal risk of flight does not constitute an extraordinary circumstance upon which to grant defendant bail pending such appeal. See Landano, 970 F.2d at 1241 (noting that district court's reliance on defendant's small risk of flight did not constitute exceptional circumstance justifying grant of bail pending district court's review of defendant's habeas petition). Thus, there is no need to conduct a hearing or to appoint counsel in connection with such a hearing on the risk of flight issue.

C. NO DANGER TO THE COMMUNITY

Second, defendant argues that he is not a danger to the community because he has no past record of violence. He seeks a hearing to present evidence supporting this contention.

As evidence that he is not a danger to the community, defendant cites the fact that he has

served over two-thirds of his sentence without a single incident of violent behavior or any disciplinary infractions. He also points out that he has no prior record of violence. These factors are insufficient to constitute extraordinary circumstances.

Moreover, good behavior in prison is expected of inmates. A federal prisoner who has complied with prison regulations is entitled to credit toward the service of his sentence. Credits so awarded are referred to as "good-time credits," and are awarded to prisoners who show "exemplary compliance with institutional disciplinary regulations . . . ." 18 U.S.C. § 3624(b)(1). The maximum good-time credit a prisoner can earn is fifty-four days per each year served on a sentence.[7] Id.

The Court commends defendant for what he says has been an incident-free period of incarceration. Nevertheless, such a record does not constitute an extraordinary circumstance sufficient to warrant bail pending appeal.

D. TIME REMAINING ON DEFENDANT'S SENTENCE

Third, defendant also argues that the Third Circuit currently takes an average of twelve to fifteen months to decide appeals. Therefore, according to defendant, if he is successful in his appeal, he will have served an additional twelve to fifteen months on his sentence.

The Court concludes that the time remaining on defendant's sentence does not constitute an extraordinary circumstance warranting bail pending appeal. Defendant was sentenced to 235 months in prison. Accepting what defendant says about his remaining sentence as correct—the fact that he has served more than two-thirds of his sentence—he has a substantial period of

[7] No attempt has been made by the Court to calculate the amount of good-time credit earned by defendant. Calculation of good-time credit is "subject to determination by the Bureau of Prisons . . ." 18 U.S.C. § 3624(b).

incarceration remaining. Even if his appeal is not resolved for fifteen months, or longer, there is no doubt that the appeal will be decided well within the period remaining on his sentence.

Courts which have found extraordinary circumstances based on the length of a defendant's sentence have done so where the sentence was so short that if bail was denied and habeas relief eventually granted, the defendant would have already served his sentence. See Boyer, 402 F.2d at 968. That certainly is not the situation presented in this case. See United States v. Moscariello, Cr. No. 98-282, 1999 WL 391382, at *1 (E.D. Pa. May 5, 1999).

Defendant's argument with respect to the time remaining on his sentence appears to be based, at least in part, on his conclusion that the statutory maximum sentence for the crime of conviction is one year and he has served more than ten years in prison. That type of argument, however, can be made with respect to almost every appeal of a conviction because most, if not all, appellants believe their convictions will be reversed. Clearly, this argument does not rise to the level of an exceptional circumstance; it is also rejected for the reasons set forth in § II.F of this Memorandum.

The Court, in denying bail, also relies on the fact that defendant was convicted and sentenced on four counts relating to importation of heroin. These are serious crimes, and "'[t]he seriousness of the crime and the lengthy sentence alone are sufficient to provide a rational basis for denial'" of bail pending appeal. Marks v. Zelinski, 604 F. Supp. 1211, 1213 (D.N.J. 1985) (citing United States ex rel. Sampson v. Brewer, 593 F.2d 798, 799 (7th Cir.), cert. denied, 444 U.S. 877 (1979) and United States ex rel. Smith v. Twomey, 486 F.2d 736 (7th Cir. 1973), cert. denied, 416 U.S. 994 (1974)).

E. SUBSTANTIAL QUESTIONS PRESENTED BY APPEAL

Finally, defendant argues that he is entitled to the relief he seeks because the Court issued a COA with respect to his Apprendi claims. According to defendant, the standard for issuance of a COA is the same as the standard for grant or denial of bail pending appeal and, since the Court issued a COA, the Court should release him on bail. He further argues that bail should issue because, if he is successful on appeal, he will have to be resentenced under 21 U.S.C. § 841(b)(3), which carries a statutory maximum of one year. Having already served almost ten years, this would result in defendant's immediate release from custody.

The Court rejects defendant's argument. Although defendant correctly states that a COA may be issued only when the Court determines that defendant has made a substantial showing of the denial of a constitutional right, see 28 U.S.C. § 2253(c)(2), that fact, without more, is insufficient to warrant bail pending appeal in this case. In the first place, the Court issued the COA so as to give the Third Circuit an opportunity to rule on the Apprendi issues presented in the context of a Rule 60(b) motion. Secondly, if the Court were to accept defendant's argument, it would mean that every criminal defendant who presented a constitutional issue that satisfied the standard for the issuance of a COA would be entitled to bail pending appeal. That certainly is not the law.

As the Court concluded supra § II.A, defendant has misconstrued the standard governing the grant of bail pending review of an adverse decision on a collateral attack on his conviction. In addition to raising substantial constitutional claims upon which there is a high probability of success, defendant is entitled to bail only if he establishes the existence of extraordinary or exceptional circumstances which make the grant of bail necessary to make the habeas remedy effective. Although not specifically argued by defendant, the Court will turn to the question

whether the issues raised on appeal themselves constitute extraordinary or exceptional circumstances which warrant the granting of bail.

The Court rejected defendant's arguments that his sentence and/or trial violated Apprendi in its Memorandum and Order of July 30, 2002. There, the Court concluded that the rule in Apprendi does not apply retroactively on collateral review. See Enigwe, 212 F. Supp. 2d at 430-31. In reaching this conclusion, the Court noted that four courts of appeals—the Fourth, Eighth, Ninth and Eleventh—had held that Apprendi does not apply retroactively, id. at 431, and that a number of district courts in the Third Circuit had reached similar conclusions. Id. (citing United States v. Robinson, Cr. No. 96-90-JJF, 2001 WL 840231, at *4 (D. Del. July 20, 2001), Levan, 128 F. Supp. 2d at 278-79, United States v. Pinkston, 153 F. Supp. 2d 557, 560-61 (M.D. Pa. 2001), and United States v. Gibbs, 125 F. Supp. 2d 700, 706-07 (E.D. Pa. 2000)). Moreover, the Court noted that the fact that the Third Circuit has subjected Apprendi errors not raised at trial to plain error review "is indicative of the Third Circuit's view that the new rule announced in Apprendi does not rise to the level of a watershed rule that can be applied retroactively to cases on collateral review . . ." Enigwe, 212 F. Supp. 2d at 431 (citing Levan, 128 F. Supp. 2d at 278).

Even assuming, arguendo, that the Third Circuit holds that Apprendi applies retroactively on collateral review, defendant would be required to establish plain error in order to prevail—in the Third Circuit, Apprendi errors not raised at trial are subject to plain error analysis. Vazquez, 271 F.3d at 99 (citing Fed. R. Crim. P. 52(b)); see also United States v. Campbell, 295 F.3d 398 (3d Cir. 2002); Barbosa, 271 F.3d at 453-54. Under this analysis, Apprendi errors do not, a fortiori, require retrial or resentencing; instead, a court must conduct an inquiry to determine whether a defendant's substantial rights were adversely affected by the error. Vazquez, 271 F.3d

at 101-03. No Apprendi remedy is "available if the court determines that the evidence was sufficiently conclusive to support the sentence actually imposed." Id. at 101.

After inquiring into whether defendant's substantial rights were violated at trial and/or sentencing, this Court concluded in its Memorandum and Order of July 30, 2002 that "defendant cannot show that the purported error impacted his substantial rights." Enigwe, 212 F. Supp. 2d at 432-33. Drawing upon an earlier Memorandum in this case, see United States v. Enigwe, Cr. No. 92-257, 1992 WL 382325, at *2-3 (E.D. Pa. Dec. 9, 1992) (addressing defendant's Fed. R. Crim. P. 29 motion), the Court determined that the only evidence of controlled substances introduced at trial related to heroin. Enigwe, 212 F. Supp. 2d at 433. There was no evidence presented that defendant might have trafficked in a drug qualifying defendant for the one-year penalty under 21 U.S.C. § 841(b)(3). Moreover, in convicting defendant of, inter alia, conspiring to import a controlled substance and importation of a controlled substance, the jury rejected the defense advanced by defendant: that he was trafficking in diamonds, not heroin. Id. Because the jury found that defendant conspired to import a controlled substance, and the only evidence as to controlled substances presented at trial related to heroin, "a properly instructed jury would have come to no other conclusion than the controlled substance at issue in this prosecution was . . ." heroin. Barbosa, 271 F.3d at 460 (affirming defendant's conviction for distribution of cocaine base and heroin and finding Apprendi violation did not affect defendant's substantial rights where only evidence of controlled substances presented at trial related to cocaine base and heroin).

Heroin is a Schedule I narcotic drug controlled substance. 21 U.S.C. § 812 Sched. I(b)(10). Under 21 U.S.C. § 841(b)(1)(C), the maximum sentence for crimes involving Schedule

I narcotics—regardless of quantity—is twenty years (240 months). Id. Defendant's sentence was 235 months. Enigwe, 212 F. Supp. 2d at 433. Therefore, any alleged Apprendi error did not increase defendant's sentence beyond the statutory maximum of 240 months. Id. at 433-34.

The Court concludes, based on the foregoing analysis, that the issues raised on appeal in this case do not constitute exceptional circumstances warranting bail

III. CONCLUSION

For the foregoing reasons, defendant's Motion for Bail Pending Appeal is denied and defendant's Motion for Appointment of Counsel and to Expedite Ruling on Pending Motion is denied as moot.

BY THE COURT:

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JAN E. DUBOIS, J.